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IN THE

Supreme Court of the United States

OCTOBER TERM, 1938

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No. ~~11~~, ORIGINAL

THE STATE OF TEXAS,

Complainant,

v.

THE STATE OF FLORIDA, *et al.*,

Respondents.

BRIEF OF RESPONDENT WILKS.

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OCTOBER TERM, 1938

No. 11, ORIGINAL

THE STATE OF TEXAS,

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THE STATE OF FLORIDA, *et al.*,

Respondents.

BRIEF OF RESPONDENT WILKS.

Statement

This is an original action instituted by Texas against the State of Florida, the State of New York, the Commonwealth of Massachusetts, Mabel Harlow Green, and Hetty Sylvia Ann Howland Green Wilks. Complainant's motion for leave to file its Bill of Complaint was granted by order of this Court on March 15, 1937.

The Bill alleges a controversy between States within the original jurisdiction of this Court. It alleges that Green died on June 8, 1936, leaving an estate in excess of $40,000,000, most of which consisted of intangible property; that at the time of his death Green was domiciled in Texas and that a Texas statute imposed an inheritance tax upon his intangible property; that New York, Massachusetts and Florida each claimed that Green was domiciled within

its borders and claimed the right to collect an inheritance tax on the value of his intangible property; and, finally, that Green's estate was insufficient, after the payment of claims having priority, to pay the aggregate of the taxes claimed by the four States.

The relief sought by the Bill of Complaint is a judgment by this Court that Green died domiciled in Texas and not in Florida, New York or Massachusetts. The respondent States admit the allegations of the Bill of Complaint except that each State denies that Green was domiciled in the State of Texas at the date of his death, and each State by counterclaim or affirmative pleading asks a judgment that he was domiciled within *its* borders.

The Court appointed a Special Master, the Honorable JOHN S. FLANNERY of Washington, D. C., to make findings of fact, conclusions of law, and recommendations for a decree, subject to consideration, revision or approval by the Court. The Special Master found that Green was domiciled in the Commonwealth of Massachusetts at the time of his death, and submitted his report to the Court which ordered that exceptions thereto, if any, be filed on or before December 12, 1938, and ordered a hearing on said exceptions on February 6, 1939. The States of Texas, Florida and New York filed exceptions to the findings of fact and conclusions of law in the Master's Report. The Commonwealth of Massachusetts filed no exceptions. Respondent Wilks filed no exceptions and urges that the Master's findings and conclusion be confirmed by this Court.

Question Presented

Whether the determination by the Special Master that Green was domiciled in Massachusetts at the time of his death should be confirmed, or set aside as unsupported by the law or by the evidence in the case.

ARGUMENT

I. The Master was correct in his legal conclusion that the place where Green had his principal home at the time of his death is the place where the law fixes his domicile.

The fundamental philosophy and practical purpose of the legal conception of domicile was explained by Justice Holmes in *Williamson* v. *Osenton*, 232 U. S. 619 (1914), where he said at page 625:

> "The very meaning of domicil is the technically pre-eminent headquarters that every person is compelled to have in order that certain rights and duties that have been attached to it by the law may be determined."

And Justice Holmes has pointed out that in determining where to fix a man's domicile the law proceeds on the basis of "the dominant facts of where he actually lives" and not at all on the basis of where the man wants to have his domicile. In *National City Bank* v. *Hotchkiss*, 231 U. S. 50 (1913), he said at page 56, by way of argument:

> "For instance, apart from possible exceptions, a man cannot retain a domicil in one place when he has moved to another and intends to reside there for the rest of his life, by any wish, declaration or intent inconsistent with the dominant facts of where he actually lives and what he actually means to do."

He expressed the same thought in an earlier case where he pointed out that the intention that is pertinent in the determination of domicile is the intention to *have a home* and not the intention to *acquire a domicile*. *Dickinson* v. *Brookline*, 181 Mass. 195, 196, 63 N. E. 331 (1902).

See also:

Matter of Trowbridge, 266 N. Y. 283, 291, 194 N. E. 756, 759 (1935);
Gilbert v. *David*, 235 U. S. 561, 569-570, 35 S. Ct. 164 (1915);
Restatement, Conflict of Laws, § 19;
1 Beale, Conflict of Laws (1935), § 19.1.

In the language of the street, a man's domicile is at the place with which he is most intimately associated in the living of his life or, in a word, at his home. In the earlier cases the courts, far from using the language of the street, resorted to Latin. The rule was that a man's domicile is where the *factum* of physical presence coincides with the *animus manendi et non revertendi*. But whatever the language, the thought is the same. If a man has a home, that is his domicile. As is said in Section 12 of the Restatement of the Law of Conflict of Laws, "when a person has one home and only one home, his domicile is the place where his home is".

See also:

1 Beale, Conflict of Laws (1935), § 12.1;
Matter of Trowbridge, 266 N. Y. 283, 194 N. E. 756 (1935).

If A lives almost all the time with his family in a dwelling place where he has his personal and intimate possessions, where he does the things which are the main activities of his life, where he likes to be and where he intends to continue to live in the way in which he has been living—that is his home. Of course, something a great deal less than that may also be a home. Whether a dwelling place is or is not a home depends upon the extent of the intimacy of the man's association with it. (Restatement, § 13.)

Not every case is as simple as A's case. There are cases in which a man is more or less intimately associated with

two or more dwelling places. For instance, B, having lived in an apartment and worked in an office in New York City for many years and clearly having been domiciled there, then retires from business, buys a farm in Connecticut and thereafter divides his time between his New York City apartment and his Connecticut farm. There may be all sorts of variations of this general situation—variations in the physical characteristics of the two places, in the time spent in each of them, in the things kept and done, and in the persons present, in each place and in the man's attitude towards each of them. The situation may be such that it is correct to say that one is a dwelling place and the other is a home or that they are both homes. The courts have not always recognized the possibility that both may be *homes*. There has been an inclination to assume, as a matter of terminology at least, that a man can have only one "home" in the sense in which that word is used in the law of domicile. But if the facts are such that the man in the street would say that B has two homes, the courts should say so, too. The Restatement accepts the proposition that a man may have two homes and in Section 24 lays down the rule that then the domicile is fixed at the one which the man regards "as his principal home".

Beale explains the necessity for this rule in Volume I of his Conflict of Laws on page 186:

> "When a person has more than one residence, all such residences may be homes, or one or more of them, or none of them. No residence which is not a home can be a domicil, as has been seen, unless it was once a home and has ceased to be such, and no other home has been acquired. On the other hand, if more than one residence is a home, only one can be a domicil. A principle must therefore exist by which a domicil can be determined in the case of plural residences or homes."

On page 191, Beale says:

"When a man has two homes, and is domiciled in the earlier, he may by a mere change of attitude toward his later home come to have a principal home and therefore a domicil there.

"This change of feeling by which what was formerly one of two equal homes becomes a predominant home may be exhibited in various ways: by a change in the manner of life, as from life adapted to the city to that of a country gentleman; by establishing the family principally in one place rather than another; or in any other way of showing a distinct preference for the life of one home."

See:

Agassiz v. *Trefry*, 260 Fed. 226 (D. C. Mass., 1919);

Thayer v. *Boston*, 124 Mass. 32 (1876);

Matter of Lydig, 191 (N. Y.) App. Div. 117, 180 N. Y. S. 843 (1st Dept., 1920);

Matter of Harkness, 183 (N. Y.) App. Div. 396, 398, 170 N. Y. S. 1024 (1st Dept., 1918).

There is nothing novel in saying that a man's domicile is where his principal home is. It is merely an application of the general rule that a man's domicile is where his home is, to the case of a man who has *two* homes. An essential part of Story's definition of domicile laid down in 1840 was that a man's domicile is where his "principal establishment" is. The fixing of domicile at the principal home is nothing more nor less than the fixing of the domicile at the place which is the "actual headquarters" of the man's life, which is Justice Holmes' definition of domicile. A man may have *quarters* in various places, but he has only one *headquarters*.

It is obvious that there are many cases in which a man, particularly if he is wealthy, so lives his life that he has seasonal homes. The city home in winter and the country home in summer furnish the best example. Each is a home because it is a dwelling place where the man keeps his personal belongings, lives with his family, engages in the important activities of his life and intends to continue indefinitely to live and engage in those activities. The geographical division of the year has no more significance than the geographical division of the day. When a man spends the daylight hours working in an office in New York and the night at home with his family in Connecticut, the law fixes his domicile in Connecticut because that is the place with which he is more intimately associated. It has never been suggested that the law ought to say that he has no domicile in either place. When a man spends the winter in New York and the summer in Connecticut, it becomes necessary for the law to determine which of the two homes is the one with which he is more intimately associated. But there is no room for the suggestion that the man does not make his home, or that the law will not fix his domicile, in *either* place.

The search always is for the place with which the man is most intimately associated. It makes no difference whether a court calls that place the man's "home" or his "real home" or his "principal home" or his "preeminent headquarters", all of which are words used by the authorities. The important thing is that every court fixes the man's domicile at the place with which it finds him to be most intimately associated.

It seems clear that the proper technique in determining which of two homes is the *principal* home is to determine which of the homes has the elements of home in the

greater degree. The elements of home are enumerated in Section 13 of the Restatement of Conflict of Laws and may be summarized as follows: A physically appropriate dwelling place; a reasonable amount of time spent there; the things which constitute the man's principal activities done there; the persons and things intimate to him customarily present there; an attitude of intimacy towards the place and an intent, when absent, to return there.

When the question is whether a man has a home in a given place, that question is answered by a consideration of the extent to which the elements referred to above exist or do not exist with respect to that place. Therefore, when the question is which of *several* homes is the principal home, it is clear that the proper way to find the answer is to consider the extent to which each of these elements exists or fails to exist with respect to each of the homes. The home with respect to which these elements exist in the greatest degree is the principal home.

There is what the Restatement calls an "unusual" situation in which a man has two homes "both equal in degree". In other words, the intimacy of the association with each of the homes is equal. In that situation the law fixes the man's domicile in the home first acquired. (Restatement, § 24.)

There is one more point which we should like to mention. In some of the cases there are statements to the effect that a domicile once acquired continues until it has been "abandoned". These references to "abandonment" lead to confusion because it is not always clear whether the reference is to the abandonment of a home or of a domicile or to a physical or a psychological abandonment. We think that the Restatement has made a real contribution to the law of domicile in emphasizing that the inquiry is not whether there has been an *abandonment of a former home or domi-*

cile, but whether there has been *the acquisition of a new home.*

Thus, paragraph (4) of Section 15 of the Restatement of Conflict of Laws reads as follows:

> "(4) A person can acquire a domicil of choice only in one of three ways:
>
> (a) having no home, he acquires a home in a place other than his former domicil;
>
> (b) having a home in one place, he gives it up as such and acquires a new home in another place;
>
> (c) having two homes, he comes to regard the one of them not previously his domicil as his principal home."

The courts recognize the soundness of the approach whereby the question of "abandonment" of a former home is not considered material and the question whether a principal home has been established elsewhere is deemed controlling. In *In re Dorrance's Estate*, 309 Pa. 151, 163 A. 303 (1932), the courts referred to an "intention on the part of the persons involved to change their true home, or to make a new residence their principal establishment and 'technically preeminent headquarters'." The Court went on to say at page 310:

> "It is argued by appellees that, before a new domicile of choice can be acquired, there must be proof of the abandonment of the old one. In our opinion, this contention is unsound, for the intention to make one's home in a new place necessarily includes the abandonment of the former home."

The Court then quoted from *Ford* v. *Peck*, 116 Kan. 74, 76; 225 Pac. 1054, 1055 (1924) as follows:

> "'Sometimes the animus is treated as involving two separate intentions, one to abandon the old location,

> and one to abide in the new. *If the last intention be formed, it necessarily includes the other.'* * * *,,
> (Italics the Court's.)

In *Atwood* v. *Atwood* (Mass.), 8 N. E. (2d) 916, 918 (1937), the Court said:

> "The intention which is significant in effecting a change of domicil is the intention to acquire a new home rather than an intention with reference to an old home."

As we understand the briefs, Massachusetts and Florida precisely concur in our statement of what the law is. Texas dissents to the extent that it claims that the law permits a man to retain a *domicile* solely by virtue of an intention to do so. This claim is unsound. The law permits a man to retain a domicile by virtue of intention, only when the intention is an intention *to return and make a home there* and not merely an intention *to retain a "legal residence" or a domicile there.*

New York states at page 105 of its brief that the correct rule of law is that "where a person has two or more homes his domicile is in the earlier home unless another is clearly proven to be the principal home, *animo et facto.*" This is precisely the rule of law upon which we, as well as Massachusetts and Florida, rely. But, as the Master found and as we shall redemonstrate, the application of it fixes Green's domicile in *Massachusetts*—not in New York. The New York brief apparently recognizes this, for in the pages which follow it attempts—but fails—to find authority for the proposition that a new home cannot become the principal home and the domicile so long as there remains *something* in the way of a dwelling place at the former domicile. Thus, at page 112, the brief claims that, assuming that New York was Green's domicile prior to

1921, it remained his domicile throughout, because he retained a dwelling place there until his death. This, of course, amounts to a complete repudiation of the whole doctrine of principal home, because it makes the earlier home remain the domicile no matter how subordinate, subservient and even insignificant it may have become.

The New York conception of the law is a product of necessity. In an attempt to bolster it the brief has a great deal to say about the presumption that when a man has once acquired a domicile in a particular place that place continues to be his domicile. This presumption is just like all other presumptions and merely states a legal conclusion arrived at in the absence of any facts upon the basis of which some other conclusion would be shown to be the correct one. Just as soon as other facts appear which tend to show the acquisition of a domicile in some other place, then the presumption disappears. In view of the mass of facts presented in the record before this Court this is not a case for reliance upon presumptions.

We think that the question whether Green had a home in New York before he settled at Round Hills is a purely academic question. If prior to July, 1921, Green had no home in New York, then the home which he established at Round Hills became his *only* home; if prior to July, 1921, Green did have a home in New York, then the home which he established at Round Hills became his *principal* home. We think, however, that the Master was right in his finding that "There is no sufficient evidence to show that Green ever intended to make New York his permanent home." (M. R. 54.) We think that during the years that Green was in New York he had a definite intention that when, upon the termination of his mother's life or of her need for his presence, he should be free he would then establish his home outside of New York—possibly in

Texas, probably somewhere else. If so, New York never became a home.

So much for the law. Applied to this case, it leads to the conclusion that *the only question of fact* in the case is whether Round Hills was Green's principal home at the time of his death.

II. The Master was correct in his ultimate finding that Round Hills, Massachusetts was Green's principal home at the time of his death.

The Special Master, who saw and heard each witness and studied the exhibits with a conscientious industry of which his Digest is a record, found that in July, 1921, Round Hills became Green's *only* home and that after the acquisition of the Florida home, Round Hills became his *principal* home and Star Island his *subordinate* home. He found that, at least after the acquisition of these two homes, the apartmental dwelling place in New York City became only a stopping off place for Green as he went back and forth between Massachusetts and Florida (M. R. 54). He further found that, at least after 1921, Green had no dwelling place in Texas and had no intention of returning to Texas to make a home there (M. R. 51, 52).

The findings of the Special Master are entitled to great weight and will not be set aside unless shown to be clearly unsupported by the evidence. We believe that such a showing is impossible because facts *which are undisputed* establish that Round Hills was Green's principal home at the time of his death. We shall not refer to *all* of the undisputed facts. Many of them have to do with details which clearly were not at all necessary to the ultimate findings of the Master and, even more clearly, are not at all necessary to sustain those findings in this Court. We shall refer only

to the undisputed facts which have to do with the larger aspects of Green's life. The facts within this limited class, standing alone, are sufficient to sustain the Master's ultimate finding that Round Hills was Green's principal home.

It is undisputed that Green's mother, Mrs. Hetty Green, died in 1916 and left him one-half of her huge fortune, subject only to a ten-year trust; that at that time Green's only dwelling place anywhere was the house in New York City which belonged to his grandfather Robinson's estate; that in July, 1917, Green married Miss Mabel Harlow.

It is clear that this was the appropriate moment for Green to make up his mind how he would lead his life in the new conditions which his mother's death and his marriage brought about. The normal and natural thing for Green to do was to establish a permanent home of a sort adapted to his character, tastes and interests. That he did not want to do this in either of the States with which he had been associated is proved by the fact that he did not then or at any time thereafter acquire any dwelling place in Texas and that in New York he did nothing more than move from a small house to a non-housekeeping hotel apartment.

It is undisputed that Green went to Round Hills, Massachusetts, in August, 1917, inspected the property there, which had been in the ownership of his ancestors for two hundred years, and started the development of the estate; that in 1918 he directed the preparation of plans for a house; that war conditions delayed the work; that in July, 1921, Green and Mrs. Green moved into the recently completed house; that he had assembled there most of the furniture which he had had in Texas and New York and most of his intimate personal belongings; that thereafter until his death Green spent an average of approxi-

mately five and one-half months at Round Hills, beginning his stay there on the first of July, or on two occasions earlier, and extending it usually into December and always into November; that the house at Round Hills was adequate as a home and the estate adapted for the establishment and development of the various scientific experiments and pursuits in which Green was interested and in which thereafter continuously until his death, or at least until his last illness, he was actively engaged, such as photography, radio, aviation, fog dispelling and atom smashing.

It is undisputed that in each of the years 1921, 1922 and 1923 Green was in New York for several months; that in the years from 1924 to and including 1933 he was there an average of less than two months in each year; that Green was not in New York at all during the last three years of his life on account of fear that he might be served as a defendant in a lawsuit; that in January, 1918, he abandoned the house in 90th Street owned by his grandfather Robinson's estate, and moved to an apartment in the Waldorf-Astoria; that when the Waldorf-Astoria was torn down in 1929 he moved to an apartment in the Sherry-Netherland Hotel, which he continued to lease from month to month until his death; that at no time after his mother's death was he engaged in any business in New York although he paid some attention to the management, first, of his mother's estate, and later of his own property; that after November, 1921, he never went to his office or attended any directors' meetings.

It is undisputed that in March, 1923, on the advice of his physician, Green made the first of his winter pilgrimages to Florida; that in the following years he spent in Florida the time which formerly it had been his custom to spend

in New York City; that during the years from 1927 to his death he was in Florida an average of four and a half months each year.

It is undisputed that the club house at No. 46 Star Island which Green had purchased in 1925 and completely remodelled and into which he moved in 1927 was adequate as a home and that the three-acre estate which surrounded it was attractive; that Green liked the Florida climate and that his health was benefited by it; that at Star Island Green engaged in no activities of a scientific nature; that the house at No. 46 Star Island, as compared with the house at Round Hills, contained few of Green's personal or intimate belongings; that life in Florida consisted of riding around in an automobile and chatting with townspeople and other residents of Miami and Miami Beach, sitting in the sun, watching private displays of moving pictures in his house, doing jig-saw puzzles and working over his coin collection.

It is undisputed that from 1892 until his death Green customarily claimed a legal residence in Terrell, Texas; that after July, 1921, Green was in Texas on comparatively brief visits only and that he had no dwelling place there, unless the private car owned by the railroad and which he was entitled to use until he ceased to be its president in 1928 can be called such.

It is undisputed that Green did not vote anywhere after 1920, when he voted in Texas, and that at no time and in no State did he pay taxes based on residence, except poll taxes in Texas in the amount of $2.75 a year.

It is undisputed that after traumatic arthritis developed in his good leg in November, 1921, Green could not get about without great difficulty; and that thereafter he never went to the theater, baseball games or other public places; that

in addition to this incapacity and beginning in 1932 Green's general physical condition began to deteriorate rapidly and that for the last two and a half years of his life he was virtually an invalid.

These undisputed facts are sufficient standing alone to sustain the ultimate finding that Round Hills became Green's *only* home before he ever went to Florida, and that after the acquisition of the Florida home Round Hills was his *principal* home and No. 46 Star Island a *subordinate* one. They also sustain the premises upon which the Master based his ultimate finding. They show that whether or not Green had a home and a domicile in New York prior to 1921, certainly he had no such interest in New York as to hold him there:

> "* * * he was free to establish a permanent home in any locality that he considered suitable, because he then had no attachment to the soil anywhere and was free from restraint." (M. R. 35)
>
> "* * * almost immediately after his marriage he went to Round Hills, Massachusetts, where he and his sister owned what he regarded as an ancestral tract of land, purchased additional land and there proceeded to erect a palatial home which was completed and occupied by him in 1921." (M. R. 51)

The undisputed facts show that the New York apartment probably was not a home at all and certainly was nothing more than a subordinate one:

> "During the last ten years of his life, this apartment in New York was used as a temporary sojourning place on his trips North and South * * *." (M. R. 33.)

Finally, the undisputed facts show that the home on Star Island was acquired and maintained simply because it was a good place to be in the winter:

"Everything he did indicated a seasonal vacation and relaxation from physical and mental effort." (M. R. 47)

"* * * his life in Florida was typical of an invalid seeking health * * *." (M. R. 47)

III. The facts upon which the exceptants rely create no doubt of the correctness of the Master's finding that Round Hills was Green's principal home at the time of his death.

What are the facts upon which the exceptants rely to sustain the burden of proving the Master wrong in finding that Round Hills was Green's only, or principal, home from 1921 until his death? The briefs of the States of Texas, New York and Florida disclose that between them they rely primarily upon only the following *five facts:*

1. The fact that from 1892 until his death Green claimed Terrell, Texas, as his domicile and legal residence.

2. The fact that the Round Hills house was built with the idea that it might some day be turned into some sort of an institution.

3. The fact that a great deal went on on the estate at Round Hills which was not conducive to quiet and repose.

4. The fact that Green spent only the months of July, August, September, October and November and part of December at Round Hills each year.

5. The fact that during the last years of Green's life he was less actively interested than formerly in the things that went on at Round Hills.

(1) As we have seen, it is elementary in the law of domicile that a man's desire or intention to have a *domicile*

in a certain place is irrelevant for purposes of the inquiry as to whether his *home* is there. The law fixes a man's domicile where he intends to make his home and not where he wishes to have his domicile. It is true, as Texas points out, that a man may retain a domicile in a state where he had a home, even after he has ceased to have any dwelling place there. But that can happen only when the man has a definite intention later on to return and make his home there. The defect in the facts fatal to the Texas case is that there is no credible testimony that Green at any time, and certainly at no time after July, 1921, had any intention of returning to Texas and making his home there.

(2) The evidence on the subject of the extent to which Green had it in mind that the house at Round Hills should be presently adequate for, and eventually converted into, an institution, goes no further than to indicate that he had some vague and general idea on the subject. But even if we should to a considerable extent accept the version of the exceptants and assume that Green had some very definite idea of converting the house into an institution in memory of his mother, still we fail to see how that would prevent Green from regarding the house as his permanent home during the fifteen years that he lived there continuously until his death. Indeed, if it is the fact that Green had a definite intention to convert the house into an institution after his death, that would seem to indicate an intimacy of interest in the estate and its permanence which would intensify his attitude towards it as a home and make it all the more his headquarters and the center of his life. There is no credible testimony that Green intended to convert the house into an institution at any definite time during his lifetime, or, for that matter, at any time at all during his lifetime. And in the absence of clear proof to that

effect, the fact that he did not do so during fifteen years of opportunity conclusively negatives the existence of such an intention.

(3) The exceptants argue at great length that because the activities at Round Hills brought large numbers of people and considerable noise to the estate, therefore it could not have been regarded by Green as his principal home. The argument ignores Green's character. He was genuinely fond of his fellow men,—in the flesh, not merely in the abstract. It gave him pleasure to see others benefited or amused by the opportunities he offered them. He enjoyed seeing the people use his beaches, and the more so because many of them talked with him. He was happy when thousands came to Round Hills to listen to the radio broadcasts and fill the grounds. Such being his favorite recreations, the noise and confusion brought satisfaction rather than unrest.

Green's other outstanding characteristic was his scientific turn of mind. Nature requires that most men, even if they are millionaires, have an occupation. Green made scientific experimentation and research in connection with photography, radio, aeronautics, fog-dispelling and atom-smashing his occupation and his life's work. He was impelled partly by his own scientific curiosity and partly by a desire to benefit the community. Similarly, although as a minor activity at Round Hills, he studied the history of the vicinity and of the whaling industry in which his ancestors had played an active part, with New Bedford as their home port. He contributed towards, and gave the land for, the perpetuation at Round Hills of the famous old whaling ship the "Charles W. Morgan" as an historical monument.

The opportunities for diversion which Green offered the people of the vicinity—and others who came long dis-

tances to enjoy them—brought him popularity and a sense of satisfaction. The scientific work which he did or made possible at Round Hills gave him a standing in scientific and educational circles which pleased him. Green did not want his headquarters to be a loafing place. He wanted them to be the place where he carried on the chief activities of his life and did the things which seemed to him the most worth while.

If Green had been interested in horse racing, he would have had a big breeding farm in the South and presumably he would have made it his home, as did Lamon V. Harkness (*Matter of Harkness*, 183 (N. Y.) App. Div. 396 (1918)). If he had once been a leader in the steel industry and had continued his business contacts and interests to the end, the law probably would have fixed his domicile in Pittsburgh, as it did the domicile of Henry C. Frick (*Matter of Frick*, 116 N. Y. Misc. 488 (1921)). In fact, however, Green's chief interest was in the scientific work and local philanthropy which he carried on at Round Hills. His heart was there and his home was there.

(4) All of the exceptants refer to the Round Hills home as a seasonal or summer home. The adjectives are misleading. Round Hills was never a summer home in the sense in which that phrase is customarily used. In the first place, Green, on the whole, stayed longer in the Round Hills home during each of the last fifteen years of his life than he stayed anywhere else. In the second place, the period of time that he was customarily there was not limited to any season. It extended from June or July well into December and thus covered the summer and the fall and ran into the New England winter. The fact that for one afflicted with rheumatism and arthritis the weather in November and December was far from beneficial establishes

that Green did not stay there for his health but because he was fond of the place and enjoyed and was interested in what went on there. Even when his health was failing fast in 1933 and 1934 he remained at Round Hills until the middle of December.

The fact that Green was at Round Hills not more than five and a half months on an average, establishes only that Green, like most rich men, preferred for one reason or another not to spend the whole year in one place. But the regularity with which he went to Round Hills on or before the first of July in each of the last fifteen years of his life, remaining for an average of five and a half months, establishes a permanence which cannot be denied.

Green could afford a long winter vacation, and after 1921, and more particularly after 1932, his health required it. The thousands from every State in the Union who leave their principal homes to go to Florida in the winter stay as long as they can afford to. They go there to rest and keep warm, and that is why Green went there. The only difference is that he was able to stay longer.

(5) The Florida exceptions are focused primarily upon the fact that during the last three years of Green's life he was less actively interested than formerly in the things that went on at Round Hills. The claim is made that his interest in Round Hills was waning, and his interest in Star Island increasing.

There is no doubt that during the years after Green moved into the Round Hills house in 1921 and before he first occupied the house at No. 46 Star Island in January, 1927, Round Hills was Green's principal, if not his only, home. He had visited Florida in 1923 and 1924, but it was not until April, 1924, that he purchased the first lot on Star Island. It was in February, 1925, that he purchased two

adjoining lots, on one of which stood the clubhouse which he ordered reconstructed and made into a residence. Green occupied it for the first time in January, 1927. If the Florida home had been acquired and developed in *substitution*, even if only partial, for the Round Hills home, there would be some basis for a claim that Star Island became Green's principal home. During those years at Round Hills Green *might* have found that the place dissatisfied or bored him. And, if so, he *might* have decided to completely change his life and make his headquarters on the three acres at Star Island.

But nothing at all like this actually happened. What happened was that, whereas in 1922 Green had gone to Dr. Buie's Sanitarium in Texas during the winter months, in 1923 he was advised to go to Florida. Thereafter he spent in Florida, the period between Christmas and the first of May or June, which theretofore he had spent in New York. He continued to spend just as much, and more, time at Round Hills than in the past, and his activities there increased. It is a fact that these years just after Green went to Florida were the years in which at Round Hills he was most active in radio and aviation and in the development of the estate. He was digging deeper into the soil of Massachusetts.

Florida does not name any date for its claim that No. 46 Star Island became Green's principal home. The Florida brief seems to recognize that it did *not* become Green's home when he first moved there. There is a great deal of talk about a gradual decrease in interest in Round Hills and an increase in interest in Star Island. And there is always an insistence that Star Island was the principal home at the date of Green's death. But just when the transfer took place, is not made clear. It appears, however, from the details relied upon to establish

the transfer, that if made at all, it must have been made in the very last years of Green's life.

The things in which Green's interest is claimed to have decreased in Massachusetts and increased in Florida were clubs, yachting and public charities. Assuming that in fact there was such a change, it does not help Florida. The Florida brief itself shows that none of these things was of any real importance in Green's life; therefore none of them could be of importance in locating Green's home. It is not claimed that Green ever used the clubs to which he belonged in either place, or that he went on his boats to any considerable extent, at least after 1929. Neither is it claimed that Green took any particular interest in public charity anywhere. The truth is that he preferred to make occasional large charitable gifts for special purposes and to benefit the community through the scientific enterprises which he financed and supervised at Round Hills. The Florida brief itself shows that Green's civic and charitable contributions averaged less than $1,000 a year for the last eight years of his life (Florida brief, pp. 17-18).

There is no doubt that after September, 1932, Green was a sick man. That is why his activities in his last years were considerably curtailed. The reason why they were curtailed more at Round Hills than in Florida is that in Florida there were fewer and lesser activities to curtail. Even a sick man can still sit in the sun, ride in an automobile, watch moving pictures and do jigsaw puzzles. But he cannot manage an aviation field and supervise experimental laboratories.

The fact that Florida claims that it was practically in his last illness that Green made Star Island his principal home shows how little merit there is in the Florida claim. Even then, Green spent no more time in Florida than in Massachusetts and made no change in the intimacy

of his relationship towards Round Hills. All of his many treasured possessions, his *lares et penates*, remained at Round Hills. Florida could find nothing of that sort at Star Island even at the end of Green's life, except some books, one photograph of his mother, two oil paintings of himself, several photographs of his wife, four awards by the National Stamp Association in New York, and Green's yachting trophies, whatever they may have been (Florida brief, p. 39).

From the *factual* point of view the Florida claim that in the last years of his life Green ceased to regard Round Hills as his principal home and came to regard Star Island in that light has no support. The factors relied upon by Florida and which we have mentioned are minutiæ. From the *legal* point of view there is no merit in the claim. The law does not fix a man's domicile at his deathbed or at the place which he finds the most beneficial to his health during his last illness.

The truth is that the only result of the acquisition of the Florida home was that Green transferred to Star Island the subordinate home, if it was a home at all, which he had had at the Waldorf-Astoria. Thereafter, he had a principal home at Round Hills, a subordinate home in Florida, and a stopping-off place in New York.

Conclusion.

Green's obligations to his mother took him to Texas and New York during the prime of his life and, later, arthritis led him to spend a part of each year in Florida. At the moment in his life when he was free from filial obligations and still in good health, when he had just inherited a fortune and been married, he settled in Massachusetts, on land which had been in his family for two hundred years. There he made himself a home which be-

came the center of the scientific and philanthropic activities which were his primary interests and the source of his greatest satisfactions. The law fixes Green's domicile where he made his principal home—at Round Hills, Massachusetts.

Respectfully submitted,

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